IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 493

LAKE CENTRAL AIRLINES, INC., *Petitioner*

v.

DELTA AIR LINES, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States.

Petitioner, an intervenor below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the cause of *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* Docket No. 25852 (No. 248—October Term, 1959) on July 21, 1960.

OPINIONS BELOW

The opinions and orders of the Civil Aeronautics Board are unreported. They are reproduced at pages 1313a-1400a, 1469a-1497a and 1509a-1536a of the Joint Appendix[1] and at pages 1593a-1595a and 1606a-1610a of the Additional Joint Appendix[2] in the cause below. The opinion of the United States Court of Appeals for the Second Circuit is reported as 280 F. 2d 43 and reproduced as Appendix A hereof.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 21, 1960. The jurisdiction of this Court is invoked under 49 U.S.C. 1486(f) and 28 U.S.C. 1254.

QUESTION PRESENTED

The sole question presented is whether the Civil Aeronautics Board may amend a certificate of public convenience and necessity after the effective date thereof by acting upon timely filed petitions for reconsideration of the Board order issuing such certificate.

STATUTE INVOLVED

Consideration of this case involves Sections 401(f) and 401(g) of the Federal Aviation Act of 1958 [72 Stat. 755-56, 49 U.S.C. 1371(f) and (g)]

Section 401(f) provides:

"Each certificate shall be effective from the date specified therein, and shall continue in effect until

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[1] Hereinafter referred to as "J.A." followed by the appropriate page designation.

[2] Hereinafter referred to as "A.J.A." followed by the appropriate page designation.

suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d)(2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased: *Provided,* That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service."

Section 401(g) provides:

"The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate."

STATEMENT OF THE CASE

The Civil Aeronautics Board ("Board") on May 25, 1955 instituted a proceeding to consider the applications of certain air carriers for service in an area between the Great Lakes and southeast United States, later identified as the "Great Lakes-Southeast Service Case". Petitioner is an air carrier certificated by the Civil Aeronautics Board to engage in so-called local, or short-haul, air transportation in the Great Lakes area over Route No. 88. The Board denied motions for the consolidation of local air carrier applications in the above proceeding, finding that the proceeding involved "predominantly" long-haul services and that the interests of any local service carrier, i.e., Petitioner, which might be adversely affected would be adequately protected by granting such local service carrier leave to intervene and, where overlapping applications were involved, to urge the mutual exclusivity of the respective trunkline and local carrier proposals.[3]

Insofar as is relevant to this petition, Petitioner's certificate of public convenience and necessity for Route No. 88 authorizes it to operate between Chicago, Illinois and Indianapolis, Indiana, via one or more intermediate points and between Indianapolis and Cincinnati, Ohio.[4] The Board consolidated in the proceeding before it an application of Delta Air Lines, Inc. ("Delta") which sought, *inter alia,* the addition of Indianapolis as an intermediate point of Delta's existing Route 54 between Cincinnati and Chicago.

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[3] J.A. 82a-83a.

[4] Petitioner has for several years operated nonstop service between Indianapolis and Cincinnati, a distance of 98 miles, pursuant to exemption authority received from the Board.

Petitioner participated fully as an intervenor in every stage of the proceeding before the Board's Hearing Examiner and the Board and introduced evidence to show the diversion of its existing and future traffic revenues which would result from the certification of another carrier in the Chicago-Indianapolis and Indianapolis-Cincinnati markets unless such newly authorized services were subject to certain so-called long-haul restrictions. In the case of Respondent, Petitioner urged that such restriction should require that carrier to originate or terminate all of its flights which served both Chicago and Indianapolis, or both Indianapolis and Cincinnati, at Atlanta, Georgia, or a point south thereof.

The Board's original opinion and order were issued on September 30, 1958[5] and, among other things, granted Respondent authority to serve the Chicago-Indianapolis and Indianapolis-Cincinnati markets without, however, being subjected to the long-haul restriction which Petitioner had urged the Board to impose on any such authorizations. The Board did impose a similar restriction on other awards in order to protect Petitioner's traffic. Petitioner filed a petition for reconsideration of the Board's original opinion and order within the time permitted by the Board's Rules of Practice[6] and prior to the effective date of the amended certificate issued to Respondent, and renewed its request for the imposition of a long-haul restriction on Respondent's Chicago-Indianapolis and Indianapolis-Cincinnati services. The amended certificate issued to Respondent by the Board's opinion and

[5] J.A. 1313a-1400a.

[6] A.J.A. 1587a-1593a.

order of September 30, 1958 was to become effective November 29, 1958.[7] (For reasons not relevant here, this effective date was extended to December 5, 1958.)[8]

On November 28, 1958, the Board issued its opinion and order disposing of the petitions for reconsideration to the extent that such petitions requested stay of the Board's order of September 30, 1958.[9] The Board stated that "because of the detailed matters raised in the petitions for reconsideration, it will not be possible to finally dispose of them until after November 29. . . . An order disposing of the petitions for reconsideration in full will be issued at a later date."[10] The Board's opinion and order concluded as follows:[11]

> "In the interim, the Board will address itself to the merits of the petitions for reconsideration, and our order dealing with these matters will issue at a later date. To the extent that we have considered the petitions for reconsideration in the present order we have done so only for the purposes of assessing the probability of error in our original decision. We feel that such action is necessary to a fair consideration of the stay requests, and is in no way prejudicial to the legal rights of those parties seeking reconsideration. *Nothing in the present order forecloses the Board from full and complete consideration of the pending petitions for reconsideration on their merits.*" (Emphasis supplied)

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[7] J.A. 1381a-1384a.

[8] A.J.A. 1593a-1595a.

[9] J.A. 1469a-1497a.

[10] J.A. 1470a.

[11] J.A. 1495a-1496a.

Inasmuch as the Board in the past had, in response to timely filed petitions for reconsideration, amended or modified certificates after their effective dates, Petitioner did not seek judicial stay of the effective date of Respondent's amended certificate. Respondent itself, in a document filed May 7, 1959 in another, related, proceeding, indicated that it was, as of that date, relying upon its own pending petition for reconsideration of the Board's decision of September, 30 1958 to accomplish further amendment of its already-effective certificate of public convenience and necessity without additional hearing.[12]

On May 7, 1959 the Board adopted and issued its Second Supplemental Opinion and Order on Reconsideration[13] which, among other things, amended Respondent's certificate of public convenience and necessity, as effective December 5, 1958, to require that Respondent's flights serving Chicago and Indianapolis, and Indianapolis and Cincinnati should originate or terminate at Atlanta or a point south thereof. Respondent thereafter sought review of the Board's orders in the United States Court of Appeals for the Second Circuit. The jurisdiction of the Court of Appeals was invoked under Section 1006 of the Federal Aviation Act of 1958 [72 Stat. 795, 49 U.S.C. 1486]. Similar amendments of the effective certificates of Eastern Air Lines, Inc. and Capital Airlines, Inc. made by the Board's supplemental opinion and order of May 7, 1959 and an earlier order in response to timely-filed petitions for reconsideration, in order to protect the traffic

[12] A.J.A. 1602a-1604a..

[13] J.A. 1509a-1536a.

of other local service carriers, were not judicially questioned by either Eastern or Capital.

Petitioner was admitted as an intervenor in the cause below and supported the action of the Board on reconsideration as well as the Board's authority to take such action.

The Court below reversed the Board's decision of May 7, 1959 and set aside the Board's order attached thereto, finding that:

> "..., under Sections 401(f) and 401(g) of the Federal Aviation Act, absent fraud, misrepresentation or clerical error in the original issuance of the certificate, it is only in a proceeding satisfying the requirements of Section 401(g) that an effective certificate authorizing unrestricted service may be modified by subsequently imposed restrictions."[14]

In so ruling, the Court accepted the Board's contention that the language referred to in footnote 11, *supra*, put Respondent on notice that the Board "purported to reserve to itself the power to modify the certificate on the basis of matters set forth in the filed petitions for reconsideration."[15]

REASONS FOR GRANTING THE WRIT

The decision below is erroneous and results from both a misconstruction of the Federal Aviation Act and a failure of the court below to give proper recognition to the decision of this Court in *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947).

The court below has read the Act so as to make Sections 401(f) and 401(g) applicable merely upon the

[14] Appendix A, page 10a.

[15] Appendix A, page 10a.

technically effective date of the certificate, even though timely petitions for reconsideration of the award of amended certificate authority have been received and are still pending the Board's decision. Such reconsideration as was sought by Petitioner was based upon the identical record on which the Board's amended award to Respondent was founded. If the holding of the court below is not reversed, Petitioner will be compelled to institute a new proceeding before the Board, bear the considerable expense of making another record which in large part will be duplicative of the portions of the prior record upon which its petition relied, and in the meantime be subject to diversion of its local traffic between the pairs of points in question until the Board's decision in the new proceeding is issued. The Board will likewise be put to considerable expense and trouble, all because of the overly-technical reading given Section 401(f) and 401(g) by the court below. Petitioner believes that such sections, properly construed in the light of the Board's prior uncontested actions and the relevant decisions of other courts, relate only to a certificate which has become final in the sense that the Board has lost all further power to deal with such certificate in the same proceeding in which it was issued. Certainly, an award which is the subject of timely filed petitions for reconsideration does not possess the degree of finality which would be the case had no petitions for reconsideration been filed. Where such petitions are still pending upon the "effective date" of the award, petitioner urges that the effect is to keep the proceeding alive until the Board has finally disposed of all such petitions.

In *Frontier Airlines, Inc.* v. *Civil Aeronautics Board*, 259 F. 2d 808 (C.A.D.C. 1958), the contention

was made that the Board erred in failing to postpone the effective date of various certificates until after disposition of petitions for reconsideration, in that the Board was without power to grant any relief on reconsideration in relation to an effective certificate. An additional argument was made that the Board was also impotent to act because of the filing of the petition for judicial review—a point not present here. The court disposed of these contentions with the following findings:

> "We do not find the order denying reconsideration invalid because rendered after this petition was filed. No harm was done. Had the Board been of a mind to grant reconsideration, it could have so indicated and a motion to remand would have been in order." (at p. 811)

Thus, in the opinion of the United States Court of Appeals for the District of Columbia Circuit, the Board retained the power to grant reconsideration even after the effective date of the amended certificates at issue. In *Waterman Steamship Corp.* v. *Civil Aeronautics Board,* 159 F. 2d 828 (1947), reversed on other grounds, 333 U.S. 103, the Fifth Circuit held that a petition for reconsideration "operated to retain the Board's authority over the order" (159 F. 2d at p. 829).

The *Seatrain* case involved a situation in which the Interstate Commerce Commission, some eighteen months after the time for seeking reconsideration had elapsed, on its own motion reopened an award because of a change in Commission policy. There, the focus was upon the fact that a significant period of time had elapsed since the Commission had *finally* disposed of the proceeding. In holding that the Commission could not reopen the award, this Court stated:

> "The certificate, when finally granted *and the time fixed for rehearing it has passed,* is not subject to revocation in whole or in part except as specifically authorized by Congress." (pp. 432-33, emphasis added)

Thus, the Court significantly recognized that had the time for rehearing not passed (as it very clearly had not in the present case), it would have had no objection to the reopening ordered by the Commission.

CONCLUSION

The decision below is erroneous and conflicts with the decisions of this Court and other circuits. If this conflict is not resolved, in Petitioner's opinion the way will be opened for a deluge of filings seeking premature judicial stays of Board orders because of the confusion created by the decision below and the parties' inability to determine at what point the Board's authority to reconsider its own decisions and orders terminates. A writ of certiorari to the United States Court of Appeals for the Second Circuit should therefore be granted.

Respectfully submitted,

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